

FILED

APR 25 2017

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee
vs.

K'von James Caine Henderson
Defendant- Appellant

S.CT. No. 16-0575
FECR204131

CLERK SUPREME COURT

**PRO'SE APPELLANT BRIEF
REBUTTAL**

**APPEAL FROM COURT IN AND FOR
BLACK HAWK COUNTY IN FRONT OF THE HONOURABLE
GEOGRE L. STIGLER JUDGE OF THE FIRST JUDICAIAL DISTRICT**

**DEFENDANT- APPELLANT'S
PRO' SE BRIEF (REBUTTAL) AND ARGUMENT**

PRO' SE

K'VON JAMES CAINE HENDERSON

**FORT DODGE CORRECTIONAL FACILITY
1550 L. STREET
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ROUTING STATEMENT

This case should be reversed and remanded or in the alternative transferred to the court of Appeals because the issues raised involves applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101 (3)(a).

STATEMENT OF THE CASE

Nature of the case:

This is a Pro 'Se Appeal, by K'von Henderson from a conviction of Robbery in the 1st Degree in violation of 711.1 and 711.2 – Class B Felony

Course of the proceedings:

The defendant concedes with the facts of the case submitted by the appellant's counsel.

I. THE DISTRICT COURT ERRED IN FINDING SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF 1st DEGREE ROBBERY IN VIOLATION OF THE U.S. CONSTITUTIONAL 14th AMENDMENT DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

A. Standards of Review:

The court will review a challenge to the sufficiency of the evidence for the correction of errors at law. State V. Corsi, 686 N.W.2d 215, 218 (Iowa 2004). Also, State v. Serrato, 787 N.W.2d 462, 465 (IOWA 2010) and State V. Bower, 725 N.W.2d 435, 440-41 (2007). The fact finder's verdict will be upheld if it is supported by substantial evidence. State V. Henderson, 696 N.W.2d 5, 7 (IOWA 2005) and State V. Nitcher, 720 N.W.2d 547, 556 (IOWA 2006). Substantial evidence means evidence that could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. State V. Heuser, 661 N.W.2d 157, 165-66 (IOWA 2003) Consideration is given to all the evidence, not just that supporting the verdict, and the evidence is viewed in the light most favorable to the State. State V. Lambert, 612 N.W.2d 810, 813 (Iowa 2000). The ultimate burden is on the State to prove every fact necessary to constitute the crime with which the defendant is charged. State V. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). Due process guarantees that no person shall suffer the onus of a conviction except upon sufficient proof -- defined as evidence necessary to convince a rational trier of fact beyond a reasonable doubt of the existence of each and every element of the offense.

Jackson V. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 571 (1979).

Constitutional challenges are reviewed de no vo. State V. Seering, 701 N.W.2d 655, 661 (Iowa 2005).

B. Preservation of Error:

Error was preserved by virtue of motions for acquittal and directed verdict towards all adverse rulings. See Trail Transcripts page 722, 14-25.

C. Discussion:

The district court erred in finding sufficient evidence to convict the defendant of Robbery in the 1st degree for the simple fact that there was no evidence in light most favorable to the state of a dangerous weapon to constitute the charge. The defendant also argues that the Prosecutor purposely prejudiced the trial by continuously rambling on about evidence of fire arms the fact of the matter is evidence of a firearm was never produced in trial, Further in the light most favorable to the State the only thing that was found that even remotely resembled a firearm was an empty, inoperable BB gun.

The defendant argues that there are quite a few problems with that evidence.

#1). The BB gun wasn't found on any of the defendants at the time of the crime.

#2). The prosecutor Failed to establish that the evidence found was in any way involved in the offense.

#3). The prosecutor failed to prove that a BB gun is a dangerous weapon.

The defendant contends that the prosecutor failed to present evidence that beyond a reasonable doubt the BB gun found was part of the offense especially when looking at the light of evidence most favorable to the State, by the prosecutor's own argument the BB gun that was obtained as evidence (wasn't) the weapon involved the Robbery offense. And the Prosecutor States as follows below;

See: Below, Trial transcripts Feb. 16th 2016/ (State) closing Argument, page767, line 1-4.

1 You have the BB gun with the
2 silencer. A BB gun that no one sees inside the pharmacy.
3 A BB gun that is much longer than what you saw on that
4 photo from the tape, a BB gun that doesn't --

The defendant now argues that because the State Prosecutor failed to meet the burden of proof that the BB gun was part of the Robbery offense and failed to meet the burden of proof the BB gun was also a dangerous weapon, the evidence is insufficient to sustain a conviction of robbery in the 1st degree. The courts have held that;

“ In a first degree Robbery case, evidence was insufficient to show that a defendant was armed with a dangerous weapon because although the state showed that defendant was armed with a fully operational BB gun it failed to present evidence to prove that the BB gun was capable of inflicting death upon a human being”

State V. Johnson, 2006 Iowa App. Lexis 1729 (Iowa Ct. App. May 10th, 2006).

In every case each and every element of the crime must be proven beyond a reasonable doubt. “Due Process guarantees that no person shall suffer the onus of a conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of each and every element of the offense.” Jackson V. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 571 (1979). The defendant argues that because the trial court allowed this unlawful conviction a miscarriage of justice has occurred. And that his rights to the U.S. Constitution 5th 6th and 14th Amendment have been violated. Further, the defendant now contends that even if a BB gun was considered a dangerous weapon there is a standard to consider whether a firearm is a dangerous weapon by its operational state and whether it is loaded at that point in time or not;

This is the Legal definition See: Ballentine's Law Dictioanry:

1). An Insrument which,when used in the ordinary manner contmplated by it's design and construction will or is likely to cause death or great bodily harm. Barboursville ex Rel. 2 whether an unloaded firearm is to be considered a dangerous weapon depends – ordinarily upon the manner in which the instrument is used or attempted to be used, whether as a firearm or as a blugeon. Authority :1 Bates V. Taylor, 115 W. Va 4, 174 se 485, 92 ALR 1093, 2.56 Am J1st weap § 4.

The defendant argues that the prosecutor failed to present evidence that the weapon in evidence was involved in the offense. The defendant argues that in fact the prosecutor made a point that the weapon in evidence was not the same weapon used in the offense See: Trial Transcript Feb. 16th 2016/ (State) closing Argument, page767, line 1-4. The defendant argues that the prosecutor failed to present evidence that the evidence obtained was a dangerous weapon. The defendant argues that the state failed to present evidence the bb gun that the state had was operable or loaded or dangerous.

FURTHER THE DEFENDANT ARGUES THAT THERE WAS INSUFFICIENT EVIDENCE IN THESE ISSUES BELOW.

CONCERNING THE JUDGES EVALUATION OF THE FACTS, PAGE 724, LINE 1-25. ALSO PAGE 725, LINES 1-25. THE DEFENDANT ARGUES THAT THE JUDGES ASSESSMENT OF THE EVIDENTIARY FACTS REQUIRED TO SUPPORT A SUBMISSION TO THE JURY CONCERNING THE PROSECUTION IS INSUFFICIENT EVIDENCE.

The defendant acknowledges and agrees that the Testimony of an accomplice or solicited person must be corroborated.

The defendant contends that the testimony of both accomplice witnesses are not corroborated. On Trial Transcript page 724, lines 10-12, the Judge states that theres enough corroboration. The defendant disagrees.

First of all the Judge states,

"given the planning that Dayton Nelson says occurred the night of September 9th (sic) and the testimony that Dayton Nelson gave as to the events that led up immediately to the Robbery on February 10th and given the events that transpired as to the whereabouts of K'von Henderson immediately prior to and immediately thereafter the Robbery."

The defendant argues that the Judge's evaluation was erroneous because the definition Aiding and Abetting, requires more than mere knowledge or presence at of a crime.

Further, trial transcripts, page 724, lines 20-23. The Judge is further erroneous by stating,

"we also have the statements made by K'von Henderson to Law enforcement which were misleading and contradictory if the jury chooses to accept law enforcement testimony." trial transcripts, page 724, lines 20-23.

The defendant contends that because the defendant was not deposed at that time, and did not testify, for the Judge to make mention that the Jury should even consider any extrajudicial statements made out of court by the defendant is not only Prejudicial to the defendant before the Jury, it is also not allowed because only depositions and witness testimony is evidence before the Jury to be considered, See: jury instructions #4. The judge violated the defendant in suggesting so.

The defendant also argues that the assessment and evaluation made by the Judge stated "corroboration of Dayton Nelson's testimony by his brother Deon when Deon Nelson testified that K'von Henderson "importuned" him to lie to law enforcement by having Deon Nelson say that K'von Henderson was with him that night when he was not with Deon Henderson or excuse me, Deon Nelson that night. See trial transcripts page 725, lines 1-4. The defendant argues that the Judge's application of the case facts to the prosecution are erroneous.

The defendant also argues that the Judges choice in words where intentionally choosen to decriminalize the act before the court room, knowing the difference in a court case between the two choice of words "importuned" and "solicited" and the difference that it makes in reference. This is a criminal case and the proper term is solicit.

First of all the Judge used the term "importuned," to avoid using the correct legal term, "solicit" pertaining to the alleged solicitation of Dayton Nelson's little brother Deon Nelson by K'von Henderson, because by acknowledging that Deon Nelson was solicited, is to acknowledge that his testimony must also be corroborated. By Deon Nelson's own testimoey he agree to mislead law enforcement even after becoming aware of the offense and in doing so Deon Nelson became an accomplice, although Deon Nelson was not charged doesn't change the legal nature of the facts of the case in the light of the evidence of the state. Therefore with Deon Nelson also being an accomplice his testimy also requires corroboration. The defendant further argues that the Judge's assessment was further erroneous in that the Judge stated, "that Dayton Nelson's testimony was corroborated by his brothers testimony," See: trial transcripts page 724, line 24-25. The defendant argues that Deon Nelson's testimony can not corroboreate his brother Dayton Nelson's testimony because they are both accomplices and Deon Nelson is both an accomplice and a solicited person. The defendant also argues that the witness testimony was prejudicial in that Deon Nelson and Dayton Nelson live within the same Household and were able to make up testimony in hopes to secure a plea bargain, Dayton Nelson was to specifically implicate the defendant. Therefore as to the facts available to the Judge and jury pertaining to K'von Henderson were insufficient to submit to the jury for a verdict.

Further the defendant argues that the fact that he had pills in an alluminum foil is not proof that the pills actually came from the crime, and that the prosecutor failed to present evidence contrary. Secondly the fact that he regular association with the rest of the defendants only showed that they were friends and that it was regular to communicate with the group of individuals. The defendant argues that in all of the courts fact and statements none are corrborating.

The defendant contends that clearly the prosecutor failed to prove his case beyond a reasonable doubt and that thus warrants a reversal of the conviction.

Therefore the defendant asks that the Honorable courts should reverse and remand this case with instructions for entry of aquittal. Or in the alternative an entry of the lesser included offense of robbery in the 3rd degree, according to the elements of the New House file 2064, as of July 1st 2016.

Referring to page 34 of the states response to corroboration of accomplice testimony. The only requirement is that the accomplices testimony be supported in some material fact tending to connect the defendant to the crime charged. *State v. Aldape*, 307 N.W. 2D 32, 41 (Iowa) It must be “inculpatory”. Also The corroboration requirement serves two purposes: First, it independently tends to connect defendant to the crime. Second, it supports the credibility of an accomplice whose motives are clearly suspect because of the accomplices self interest in focusing the blame on the defendant. *State v. Brown*, 397 N.W. 2D 689, 694 (Iowa 1986). The existence of corroborative evidence is a question of law for the court, but its sufficiency is a question of fact for the fact finder. *Bugely*, 562 N.W. 2D at 179. Each case must be governed by its own circumstances, and evidence that merely raises a suspicion the accused is the guilty party is not sufficiently corroborative of the testimony of an accomplice to warrant a conviction. *State v. Gillespie*, 503 N.W. 2D 612, 617 (Iowa Ct. App. 1993). The state says there was “ample evidence to corroborate the testimony of Dayton Nelson. The defendant disagrees.

There was insufficient evidence to corroborate the testimony of the accomplice Dayton Nelson in result the court erred in submitting this case to the jury because evidence was insufficient.

First, the states argues that Delila Salman, Plummers girlfriend testified that the five were at Plummers residence on February 9th and 10th of 2015. Now being that they are all friends does not spark any suspicion as to them being together at all. In fact Dalila stated herself that she did not hear at all what they were talking about (see trial tran IV pages 615 lines 23, 24)

Also (pages 618 and 619 lines 25, 1, 2 and 3) She was also asked if she heard conversation pertaining to the Greenwood Pharmacy Robbery and again she answered no. (See page 626 Trial tran IV lines 21-23). The state failed to corroborate the testimony of Daliia Salman with Dayton Nelson. \

Second the state presented cell phone records from all the defendants pertaining number of calls, dates, times and frequencies. But the state failed to present the content of the calls. Some of these calls are long, some are even short, what was said we don't know, what we do know is that over 59 calls were on the defendant Henderson's phone bot incoming and outgoing in a 12 hour period between people the defendant knew, former roommates and members of the music group. No strangers. So what does that mean? Without the content, the meaning is lost. What it represents is simply chatter between young people. The state argues that it is consistent with Daytons testimony as to Riley Mallet calling Mr. Henderson to inform him of the changes of the plans. The defendant disagrees, In fact Mr. Henderson could have easily been answering the phone and simply declining participation in the robbery. Once again the states argument only alleges speculation.

Third, the state argues that the officers searched Mr. Henderson and found tinfoil in his pocket which contained 11 green pills determined to be Alprazolam or Xanax, the same drug stolen in the robbery. Now being the fact that there was absolutely no way the state could have proved that the pills found on the defendant were in fact the same exact pills stolen from the pharmacy leaves the jury to speculate. In fact the same officer that found the pilss on Mr. Henderson stated there was no way to link the pills to the robbery. (see Trial tran #3 page 527 line 8-18) Also the statements made by Kaylyn Henderson (see Trial tran #5 page 834 lines 8-15)

Lastly, the state argues that Dayton Nelson testified that the defendant Henderson drove an Alero to his designated spot to wait for Mallet and Plummer and later officers found the alero at Nelsons house and searched it and inside the alero, officers found a “black bag that was similar to what was used in the robbery. The defendant argues that “similarity” simply isn't enough. In fact Dayton Nelson testified that he himself ditched the bag down the street and threw away the “victoria secret bag” (see Trial tran 3 pages 398-399 lines 22-25 and 1-14) Once again no corroboration.

No basis for a presumption in favor of the accomplices testimony, arising from a failure to attack it. In the case supposed, there is no evidence except that of the accomplice. The failure to corroborate him, leaves his testimony standing alone, and the statue declares to be insufficient to justify a conviction. McLaren v. Hall et al. Supreme Court of Iowa, Des Moines 26 Iowa 297; 1868 Sup Lexis 111.

The defendant argues that in all of the courts fact and statements none are corroborating. The defendant contends that clearly the prosecutor failed to prove his case beyond a reasonable doubt and that thus warrants a reversal of the conviction.

**II. THE TRIAL COURTS VIOLATED THE U.S. CONSTITUTIONAL
6th AMENDMENT RIGHT TO AN IMPARTIAL JURY BY
ALLOWING WAIVER OF VOIR DIRE IN A CASE WHERE
INTERRACIAL VIOLENCE AND PUBLICITY ARE
POTENTIALLY PREJUDICIAL ISSUES.**

A. Standards of Review:

Issues Constitutional challenges are reviewed De No vo,
State V. Dudley, 766 N.W,2d 606, 612 (Iowa 2009). Constitutional challenges are
reviewed De No vo, State V. Seering 701 N.W.2d 655, 661 (Iowa 2005).

B. Preservation of Error:

The defendant asks that the Honorable courts determine preservation of
error.

C. Discussion:

The defendant Contends that his United States Constitution 6th Amendment right to an impartial Jury has violated because the trial courts failed to conduct a proper Voir Dire into matters of prejudice, that are non waiverable due to the nature of the crime. Based on two grounds. The first ground because there was interracial violence and the second ground, the level of television exposure to media coverage due to a mistrial on December 2nd 2015. See the defendant's pro'se appeal exhibit included with the pro'se brief.

These are some of the Authorities that govern Voir Dire.

Jury § 38,42- examination of Jurors- Impartiality. 5. Voir Dire of Prospective Jurors in a criminal case is conducted under the supervision of the court, And a great deal must be left to the courts sound discretion; the Federal Constitution does not dictate a particular set of question for Voir Dire, but only that the defendant be afforded an impartial Jury; However part of the guarantee of a defendant's <*pg.496 > right to an impartial Jury is an adequate Voir Dire to identify unqualified Jurors, And therefore the exercise of the trial court's discretion, And the restriction upon inquiries at the request of the counsel, are subject to the essential demands of fairness,.

Constitutional Law § 841, 842 - Due Process – Juror Impartiality [2] The Due Process clause of the Federal; Constitution's Fourteenth Amendment requires that if a Jury is to be provided for a state criminal defendant, then, regardless of whether the Constitutions Sixth Amendment requires that a Jury be provided, the Jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment,.

The defendant contends that in order to effectively protect the defendants rights and activate an impartial Jury, Voir Dire should be Held, and in prosecutions for crimes against persons Voir Dire becomes a Requisite. Therefore particular questions must be asked the jury in order to establish their impartiality, the courts have held “[Neither] this court nor the parties should be precluded from asking “case – specific “ Questions to attempt to discover a potential juror's bias based on facts that are or are likely to be

at issue in this case.” Waites V. Wallace, 4:12 CV 1152 CEJ, 2015 U.S. Dist. Lexis 93840, 2015 WL 4429754, at *7 (E.D. Mo. 2015). The Honorable Courts have held, “The Trial court must conduct a Voir Dire examination of prospective jurors, in order to reveal potential bias, See: Mu 'Min V. Va., 500 U.S. 415, 431 (1991) (Voír Dire) enables court to select impartial jury and assist counsel in exercising peremptory challenges. The defendant now argues that because there was a mistrial on December 2nd 2015 and the case became public, there should have been made peremptory instructions regarding the media coverage and the into the possibility of racial tension due to the nature of the crime. It has further been held “ Courts should consider content of publicity, publicity's timing in relation to critical stages of trial, its effect on legal defenses, and likely hood that publicity has in fact reached jury, vacated on other grounds Moore V. U.S. 519 U.S. 802 (1996) Also vacated on other grounds, Sterling V. U.S. 516 U.S. 1105 (1996). Now because the Trial went public the high courts have determined that “If publicity threatens to prejudice the proceedings at any point, the Judge must ensure that prospective Jurors have not formed preconceptions of the defendants guilt,. To accomplish this the court may be required to grant a defendant's request for individual questioning of each prospective juror, See: Mu'Min, 500 U.S at 424 , Also See: Turner V. Murray, 476 U.S.28, 35-37 (1986). The defendant argues that no proper Voir Dire was held. The defendant also argues that because he is African American and the victims are white, that Voir Dire becomes a requisite and is not waiverable, See: E.G. U.S.V. Salameh, 152 F.3d 88, 120 – 21 (2d Cir 1998). The defendant asks that the Honorable courts review and decide this claim based on it's merit.

III THE DEFENDANT WAS DENIED U.S.CONSTITUTIONAL 6th AMENDMENT RIGHT TO CONFRONT WITNESSES.

A. Standards of Review:

Issues Constitutional challenges are reviewed De No vo, State V. Dudley, 766 N.W,2d 606, 612 (Iowa 2009). Constitutional challenges are reviewed De No vo, State V. Seering 701 N.W.2d 655, 661 (Iowa 2005).

B. Preservation of Error:

Error was preserved by virtue of motions in limine See: Trial transcripts

C. Discussion:

THE DEFENDANT NOW BRINGS TO THE ATTENTION OF THE COURTS ALL OF THE PORTIONS OF THE TRIAL TRANSCRIPT THAT IS BELIEVED TO HAVE BEEN IN VIOLATION OF THE DEFENDANTS RIGHTS TO CONFRONT WITNESSES.

The defendant also contends that the prosecutors continuous reference and admission of his co-defendant's (Myles Anderson) prior criminal history violationed the 6th amendment right to confrontation. Also the Prosecutor states that he intends to use testimony of two non-testifying co-defendants. See: trial transcripts page 28, lines 16-19.

IV.

THE ATTORNEY FOR THE DEFENSE RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL IN VIOLATION OF THE U.S.
CONSTITUTION 6th AMENDMENT RIGHT TO EFFECTIVE
ASSISTANCE OF COUNSEL.

A. Standards of Review:

Review is De no vo with the courts making its own determination of the totality of the circumstances. State V. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). In analyzing an ineffective assistance of counsel claim a court need not determine whether trial counsels performance was deficient before examining the prejudice component of the ineffective assistance of counsel claim. State V. Tate, 710 N.W.2d 237, 2006 Iowa Sup. Lexis 26 (Iowa 2006).

The Sixth Amendment to the U.S. Constitution guarantees the right to effective counsel. Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L. Ed.2d 674 (1984). A defendant is entitled to a New trial if he can show (1) That trial counsel's performance, was deficient; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have different. Id. at 687.

B. Preservation of Error:

A claim of ineffective assistance of counsel provides an exception to the general rules of error preservation. State V. Lucas, 323 N.W.2d 288, 232 (Iowa 1982). Even if there was a failure to preserve issues under the United States Constitution, such claims inartfully made or not preserved could be ressurected under the Aegis of an ineffective assistance of counsel claim. State V. Brubaker, 805 N.W.2d 164 170 (Iowa 2011). Reviews of ineffective assistance of counsel claims are an exception to the traditional error preservation rules, a defendant therefore may raise this claim on direct appeal, Iowa Code 814.7(2) (2005).

C. Discussion:

These are the facts that support the ineffective assistance of counsel claim.

INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE # (1)

THE COURT APPOINTED COUNSEL WAS INEFFECTIVE BY FAILING TO OBTAIN DEPOSITIONS OF AN ACCOMPLICE WITNESS (DEON NELSON).

Facts in support of : Counsel for the defendant allowed an Accomplice witness to testify without having first been deposed. The courts have held that "Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision." Foster V. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993). See also, Sanders V. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

The defendant argues that because defense counsel failed to depose the accomplice witness, there was no prior testimony available to reflect any inconsistencies in the testimony being

told other than the initial police interview that indeed was contrary to the testimony that the accomplice witness gave at trial. The defendant argues that the attorney should have objected to the testimony of Deon Nelson at trial on the Basis that he had not been predeposed.

INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE # (2)

THE COURT APPOINTED COUNSEL WAS INEFFECTIVE BY FILING A MOTION IN LIMINE TO FORBID THE PROSECUTOR FROM MAKING REFERENCE TO OTHER CO-DEFENDANTS TESTIMONY.

#1). The court appointed counsel was ineffective in his trial strategy and filed a motion in limine to forbid the State Prosecutor from referring to the statements made by co-defendants, See: trial transcripts page 8, lines 8-14. However three out of four of those co-defendants testimony regarding the defendant in fact were exculpatory in that they all three said that Mr. Henderson didn't want anything to do with committing the offense and therefore declined to participate. In Fact even Dayton Nelson initial testimony is that at the time of the offense he wanted for K'von Henderson to be a getaway driver however at that point the defedant Mr. Henderson left the scene instead, See: Police interviews of Dayton Nelson. Now in declining to be a getaway driver at that point would vindicate Mr. Henderson because aiding and abetting must have a positive act of cooperation on the part of the participant, and knowing of the offense is not enough. See: Police interviews of Dayton Nelson. Also this same uncontested evidence is found that Mr. Henderson declined involvement is within the initial interview of all four co-defendant's. Therefore the defendant argues that the appointed counsel was ineffective by filing the motion in limine because all of the non testifying co – defendants gave statements that Mr. Henderson continued to decline involvement in the offense. In Fact the appointed attorney should have done just the opposite and sought out this evidence of Mr. Henderson's non- participation.

INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE # (3)

COUNSEL FOR THE DEFENDANT FAILED TO OBJECT TO THE INADMISSIBLE EVIDENCE OF THE CRIMINAL HISTORY OF A NON-TESTIFYING CO-DEFENDANT THAT TOOK A PLEA BARGAIN, ALLOWING THE JURY TO BE PREJUDICED, AND MISLEAD AS TO THE GUILT, FACTS AND CHARACTER OF THE DEFENDANT ON TRIAL.

Facts in support of :

During the trial of the defendant the prosecutor introduced the prior criminal history of one of the defendants Co-defendants specifically (Myles Anderson). That criminal history was an offense that involved a burglary of over 20 firearms. The introduction of that criminal history was extremely prejudicial because the defendant had no involvement in that prior criminal offense and due to the nature of the prior conviction of his co-defendant the defendant argues that type of evidence is inadmissible and should have made his co-defendant and the criminal history subject to cross examination. The criminal history evidence is also in violation of the

Iowa Rules of court 5.404(b) Character evidence not admissible to prove conduct exceptions other crimes, wrongs or acts is not admissible to prove the character of a person in order to show the person acted in conformity therewith, it may, however, be admissible for other purposes, such as proof of motive, opportunity , intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The defendant Argues that although this may be fair and applicable in some instances, that it is only a rule enforceable when used in its proper context and when that evidence will not likely prejudice the jury towards the Co-defendants.

The defendant now argues that, the evidence of other crimes, specifically a burglary of over two dozen firearms in a prior conviction of his Co-defendant gave the Jury the impression that all of the defendants also must be hardcore criminals that are into

Burglaries, Firearms, Robberies. See: Trial Transcripts page 27 lines 23-25. and page 28, line 1-4. The defendant argues that to give that kind of impression to the Jury would automatically suggest to the Jury on an improper basis that they should get these defendants off of the streets. The defendant argues that the evidence was unlawfully applied by the prosecutor to prove that the defendants had possession of firearms, See Page 746 Line. 1-6. The prosecutor also continuously made prejudicial comments that the defendants possessed a firearm, See: trial transcripts page 776 line 17-22 and trial transcripts page 773 line 17-21 when there was never a real gun recovered nor did the prosecutor establish that a real gun was ever possessed. The defendant also argues that the state maliciously prosecuted the defendants by using the past criminal history of a co-defendant to prove that he possessed a firearm was in violation of the United States Constitution 14th Amendment Right to Due Process and the Equal Protection of the Law, and United States Constitution 6th Amendment Right to an impartial Jury, a Fair Trial. Further, the defendant argues that even if the prior conviction of his Co-defendant was used in its proper context (Although it wasn't) The prior conviction of the co- defendant is of such a serious degree in nature would fall into the category of inadmissible evidence Pursuant Iowa Rules of Court Rule 5.403 Exclusion of relevant on grounds of prejudice, confusion, or waste of time, in which states;

" Although Relevant, evidence may be excluded if it's probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of accumulative evidence. "

The Balancing of probative value against the grounds for exclusion is for the trial courts discretion. State V. Harmon, 238 N.W.2d at 145.

The Court must first determine whether the evidence has some probative value, if it does, then the Court must weigh the probative value against the policy grounds for exclusion. State V. Harmon, 238 N.W.2d 139, 144-45 (Iowa 1976), cert. denied 101 S. Ct. 138 (1981). The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy, A conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick, § 152, pp. 319-321. However given the circumstances, the defendant argues that the Prosecutor's use of his Co-defendant's (Myles Anderson) Prior conviction of a Burglary of over two dozen firearms was extremely prejudicial and malicious because in fact Myles Anderson's prior conviction was totally irrelevant to the present prosecution for robbery in the first degree because the evidence was not the evidence in question concerning the robbery prosecution, because there never was any firearm recovered, and therefore there was no evidence linking the two offenses together. The defendant now asserts that the prosecutor prejudicially implanted in the minds of the Jury that the defendants had access to firearms the essential element of a Robbery in the 1st degree. No firearms were found in this case.

Further the defendant Contends that to allow admission of the prior convictions of his Co-defendant and not subject both the prior criminal history and the co-defendant to cross examination is both abuse of discretion and plain error. Here is an example of this type of situation See: U.S. V. De La Vega 913 F.2d 86 (11th cir.1990).

INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE # (4)
COUNSEL FOR THE DEFENDANT FAILED TO MAKE PROPER VOIR DIRE OF THE ISSUES.

Facts in support of:

The defendant Contends that his United States Constitution 6th Amendment right to an impartial Jury has violated because the trial courts failed to conduct a proper Voir Dire into matters of prejudice, that are non waiverable due to the nature of the crime. Based on two grounds. The first ground because there was interracial violence and the second ground, the level of television exposure to media coverage due to a mistrial on December 2nd 2015. See: the defendant's pro'se appeal exhibit included with the pro'se brief. The defendant contends that counsel was ineffective by failing to make proper voir dire into the issues hereby.

INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE # (5)
COUNSEL FOR THE DEFENDANT WAS INEFFECTIVE BY FAILING TO ARGUE
THAT NOT ONLY WAS THE OBJECT IN EVIDENCE NOT PROVEN TO BE A
DANGEROUS WEAPON, ALSO THAT THE PROSECUTOR FAILED TO PROVE THAT
THE OBJECT WAS INVOLVED IN THE OFFENSE.

By the prosecutors own testimonial evidence the object that was seized was not the same object involved in the offense.

See: See: Below, Trial transcripts Feb. 16th 2016/ (State) closing Argument, page 767, line 1-4.

- 1 You have the BB gun with the
- 2 silencer. A BB gun that no one sees inside the pharmacy.
- 3 A BB gun that is much longer than what you saw on that
- 4 photo from the tape, a BB gun that doesn't --

The defendant contends that clearly the prosecutor failed to prove his case beyond a reasonable doubt and that thus warrants a reversal of the conviction.

CONCLUSION

WHEREFORE the Plaintiff, moves this Honorable Court to rule in favor of the defendant and for any other relief the Court may deem proper under the circumstances. and respectfully requests that this Court reverse and remand this matter with directions to vacate the conviction for Robbery 1st degree. Or in the alternative to vacate the conviction with instructions to enter the charge of the lesser included offense pursuant the new House File 2064 Robbery in the 3rd degree an aggravated misdemeanor, and for any other relief the Court may deem proper under the circumstances.

NONORAL SUBMISSION

Oral argument is not requested in this matter.

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FILED
APR 25 2017
CLERK SUPREME COURT

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